

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**
Western Division

THE PROCTER & GAMBLE COMPANY,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO. C-1-02-393
v.)	
)	Hon. Walter Herbert Rice (Chief Judge)
THE COCA-COLA COMPANY,)	Hon. Sharon L. Ovington (Magistrate)
)	
Defendant.)	
)	

**THE COCA-COLA COMPANY’S MOTION FOR LEAVE TO FILE SUR-REPLY
BRIEF TO RESPOND TO A NEW ISSUE OF UNSETTLED LAW RAISED IN
PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

The Coca-Cola Company (“Coca-Cola”), through counsel, respectfully moves for leave to file a Sur-Reply Brief to advise the Court of a recent case development of the United States Court of Appeals for the Federal Circuit on a question of law that has direct bearing on a central issue raised in the Motion and Supporting Memorandum filed by The Procter & Gamble Company (“P&G”).

In support thereof, Coca-Cola states the following:

1. An important issue raised in P&G's Supporting Memorandum concerns the attempt to force the involuntary disclosure of attorney-client communications, opinion letters, and work product, and the appropriateness of drawing an adverse inference of willful infringement when an accused infringer exercises its right to claim the attorney-client privilege. The ability to force Coca-Cola to choose between the unacceptable alternatives of either waiving privilege or incurring an adverse inference at trial is probably the most important driving force

behind the attempt to amend the complaint at the close of discovery. (See P&G's Supporting Mem. at 4.)

2. On September 26, 2003, the Federal Circuit indicated that the appropriateness of imposing the adverse inference against a party accused of willful misconduct will be reviewed. In *Knorr-Bremse Systeme Fuer Natzfahrzeuge GmbH v. Dana Corp.*,¹ the Federal Circuit decided to reconsider *en banc* "its precedent concerning the drawing of adverse inferences, with respect to willful patent infringement, based on the actions of the party charged with infringement in obtaining legal advice, and withholding that advice from discovery."²

3. In the absence of any newly discovered evidence supporting P&G's allegation of willfulness, Coca-Cola seeks leave to briefly inform the Court regarding the implications of the *Knorr-Bremse* ruling on P&G's Motion For Leave To File Second Amended Complaint. Instead of identifying any actual evidence of deliberate infringement or conscious disregard of P&G's patent rights, P&G only relies on the existence of Coca-Cola's legal opinion, the results of which are irrelevant to P&G's explanation for filing an untimely pleading on so important an issue.

¹ Slip. Op. 01-1357 at 3 (Fed. Cir. Sept. 26, 2003) (identifying the opinion in *Kloster*, 793 F.2d 1565, 1580 (Fed. Cir. 1988), which P&G's Supporting Memorandum heavily relies upon, as being subject to reconsideration).

² *Id.* (inviting the parties and *amicus curiae* to submit briefs on, *inter alia*, the issue of "[w]hen the attorney-client privilege and/or work product privilege is invoked by a defendant in an infringement suit, is it appropriate for the trier of fact to draw an adverse inference with respect to willful infringement?").

WHEREFORE, Coca-Cola respectfully requests that this Honorable Court grant leave to file the Sur-Reply Brief in the attached Exhibit A and provide further relief as the Court deems appropriate.

Dated: October 8, 2003

/s/ Michele L. Mayberry

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of THE COCA-COLA COMPANY'S MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF TO RESPOND TO A NEW ISSUE OF UNSETTLED LAW RAISED IN PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT was served on this 8th day of October, 2003, via Facsimile and Federal Express to Plaintiff's counsel:

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